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No. 81-51

# In the Supreme Court of the United States

**October Term, 1981**

LARRY W. ABRAMS,
*Petitioner,*

vs.

MISSISSIPPI STATE BOARD OF HEALTH, ALTON B. COBB and WILFRED Q. COLE, Individually and in Their Official Capacities As Members of the Mississippi State Board of Health, Their Agents, Employees, Successors and All Other Persons Acting in Concert With Them; VAN PHILPOT and EDWARD GORE,
*Respondents.*

## BRIEF OF RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the Eleventh Amendment to the Constitution of the United States as interpreted by *Alabama v. Pugh*, 328 U.S. 781, 57 L.Ed.2d 1114, 98 S.Ct. 3057 (1978), bars the maintenance of an action in federal court against an agency of the state when the state has not consented suit or waived its Eleventh Amendment immunity.
2. Whether the due process clause of the Fourteenth Amendment applies to indirect adverse effects of governmental action taken against a third person in order to protect public health and safety.
3. Whether the action of a state agency violates a liberty of property interest of an individual when by its order it conditions the licensure of a third party on the severance of an employment with the individual.
4. Whether a protected liberty interest is implicated when a state agency determines that an individual has engaged in the unlawful practice of medicine prohibited by state statute, especially when that individual admits that he engaged in such practice.

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## BRIEF OF RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI

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### STATEMENT OF THE CASE

In response to complaints that a licensed physician, Dr. John D. Dyer, was aiding an unlicensed person in his employment to practice medicine, the Medical Licensure Division of the Mississippi State Board of Health initiated an investigation of alleged activities. The investigation indicated that Dr. Dyer had knowingly permitted his physician assistant to treat patients, to establish the

doctor-patient relationship in his absence and without his supervision, and to prescribe in his absence numerous prescriptions for both controlled substances and legend drugs. Dyer was subsequently summoned to appear at a hearing before the State Board of Health to respond to charges that he had knowingly assisted an unlicensed person to practice medicine contrary to state statute.

Dyer requested and was provided with a statement of all factual allegations and documents which formed the basis for the charges against him. He appeared at the hearing and was represented by counsel during the proceeding. After a full evidentiary hearing, the State Board of Health found Dyer's conduct and activities to be in violation of state law. It entered an order suspending his medical license for three years. The Board further stated in the order that it would stay enforcement of the suspension on the condition that Dyer terminate the employment of his assistant, Larry W. Abrams, and in the future conform his conduct to the guidelines adopted by the Board regarding utilization and supervision of physicians. (R. 89-92). Dyer later terminated the employment of petitioner as his physician assistant.

Following the hearing before the State Board of Health, petitioner submitted a public statement to the newspapers summarizing the actions taken by the State Board of Health and denying any wrongdoing on his part. The statement received front page coverage in the community and in two other cities across Mississippi. At about the same time, the Board issued a memorandum of the disciplinary action it had taken regarding Dyer to seven (7) state and federal drug and health care agencies and the state and national medical associations.

Petitioner filed this action on December 4, 1979, against the Mississippi State Board of Health, two of its officers,

and two private physicians who had testified or provided information in connection with Dyer's licensure hearing. On February 8, 1980, defendants deposed petitioner, and on April 25, 1980, moved for summary judgment based in part on the deposition of petitioner himself. The district court granted defendants' motion and dismissed the action on June 5, 1980. On June 9, 1980, petitioner filed his notice of appeal. On March 6, 1981, the Fifth Circuit Court of Appeals affirmed, without an opinion, the decision of the district court.

## REASONS FOR DENYING PETITION

This case involves the existence of a liberty or property interest. The district court fully considered the arguments now advanced by the petitioner. Its analysis is not based upon a new principle of law, but rather the particular facts and circumstances as were before it. Both the district court and the court of appeals correctly applied the controlling precedent of this Court to the particular facts of the case, *i.e., Board of Regents v. Roth,* 408 U.S. 564, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972); *Paul v. Davis,* 424 U.S. 693, 47 L.Ed.2d 405, 96 S.Ct. 1155 (1976); and *Codd v. Velger,* 429 U.S. 624, 51 L.Ed.2d 92, 97 S.Ct. 882 (1977).

There is no departure from precedent of this Court, nor is there a conflict in circuits. Neither will a decision in this case require the court to address new questions of law. Inasmuch as the case was decided on its own special facts, it will have no precedential effect upon other litigants or individual rights. Finally, this case does not reflect other factors frequently relied upon by this Court in determining whether to grant *certiorari, i.e.,* Rule 17.

## ARGUMENT

### I. The Eleventh Amendment Bars the Present Action Against the Mississippi State Board of Health.

This action against the State Board of Health, which is an arm and agency of the State of Mississippi, is barred by the Eleventh Amendment. In *Alabama v. Pugh*, 328 U.S. 781, 57 L.Ed.2d 1114, 98 S.Ct. 3057 (1978), plaintiffs brought an action against the State of Alabama, the Alabama Board of Corrections, and individual state officials. On appeal, this Court held:

> There *can be no doubt*, however, that the suit against the state and its board of corrections is barred by the Eleventh Amendment unless Alabama has consented to the filing of such suit. [Citation omitted] [Emphasis supplied].

The complaint does not allege and the record fails to disclose that the State of Mississippi has consented to this suit or waived its Eleventh Amendment immunity to suit in federal court.

Consequently, the district court correctly dismissed the Mississippi State Board of Health from the action.

### II. The Action by the State Board of Health Deprived Petitioner of No Liberty or Property Interest.

The requirements of procedural due process apply only to the state deprivation of interests encompassed by the Fourteenth Amendment's protection of "liberty" and "property." *Board of Regents v. Roth, supra.*

Petitioner's claims are based upon the action of his employer in terminating his services and the alleged stigmatizing effect of the Board's order. Analysis of a property interest turns upon the existence of a legitimate

claim of entitlement to continued employment arising out of state law. The inquiry regarding a liberty interest focuses upon the nature of the decision of the State Board of Health.

### A. Petitioner enjoyed no legitimate property interest in continued employment.

To have a property interest that is constitutionally protected by due process, petitioner must have had a legitimate claim of entitlement to continued employment arising out of state law. A unilateral expectation is insufficient. *Board of Regents v. Roth, supra.*

Petitioner alleges a property interest arising out of a private employment relationship. In particular, he asserts that he was to be "permanently employed" by Dr. Dyer as a physician assistant. Petitioner testified during his deposition that he had never entered into a written contract with Dyer nor was his employment for a fixed period. According to petitioner, the terms of his employment were that he was to continue to work so long as it was mutually agreeable. Under Mississippi law, "permanent employment" means employment terminable at the pleasure of either party. *Rape v. Mobile & Ohio R.R. Co.*, 136 Miss. 38, 100 So. 585 (1924); *Green v. Amerada Hess Corp.*, 612 F.2d 212 (5th Cir.), *rehearing en banc denied*, 614 F.2d 1298 (5th Cir. 1980).

It is plain that petitioner had no enforceable property interest or entitlement in continued employment with Dyer; rather, his employment was one terminable at the will of his employer. If he had no legitimate claim of entitlement to continued employment with his private employer, neither does he have any greater right in this action against defendants.

It is significant that the Board of Health would have been fully justified in enforcing the suspension of Dyer's

licen to practice medicine. Had it done so, petitioner would have lost his employment since his employer would have no longer required the service of an assistant. The fact that petitioner may have indirectly lost his employment would not have been sufficient to invoke the requirements of due process. *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 65 L.Ed.2d 506, 100 S.Ct. 2467 (1980).

**B. Petitioner was not deprived of a liberty interest protected by the due process clause of the Fourteenth Amendment.**

Petitioner relies upon *Greene v. McElroy*, 360 U.S. 474, 3 L.Ed.2d 1377, 79 S.Ct. 1400 (1959), for the proposition that he has liberty and property interests in holding specific private employment and following his chosen occupation free of unreasonable governmental interference. In that case, the Court recognized that specific employment may constitute a property interest and that the right to follow one's chosen occupation constitutes a liberty interest within the meaning of the Fifth Amendment. The Court, however, declined to rule on the constitutional claims, ruling instead on the question of authorization. Thus, petitioner, although he may allege he has a property right in specific employment, has no liberty interest in specific employment. See: *Board of Regents v. Roth, supra.*

Neither has petitioner been denied the opportunity to take advantage of other employment or to pursue his chosen occupation. The State Board of Health has taken no action against petitioner which would preclude him from other employment opportunities as a physician assistant. He remains free to pursue and accept employment with any other licensed physician in the state or elsewhere in the United States. See: *Cafeteria Workers v.*

*McElroy*, 367 U.S. 886, 895-896, 6 L.Ed.2d 1230, 81 S.Ct. 1743 (1961).

Petitioner further contends that the finding entered by the Board with respect to Dyer has so stigmatized him in the community and his profession that he is effectively barred from following his chosen occupation.

Petitioner finally urges this court to review this case so that he may be afforded an opportunity to clear his name and continue his occupation.

In *Codd v. Velger*, 429 U.S. 624, 51 L.Ed.2d 92, 97 S.Ct. 882 (1977), this Court emphasized that the purpose of giving notice and a hearing in the context of a defamation liberty interest is to provide an individual with an "opportunity to clear his name." The Court further reasoned for a due process hearing to serve any useful purpose, there must be some factual dispute between the parties which has some significant bearing on the petitioner's reputation. (at p. 627). The Court concluded that notice and a hearing were necessary only where the employer (state) "creates and disseminates a *false and defamatory* impression" about an individual in connection with his employment termination.

Petitioner *sub judice* asserts that a dispute yet remains whether he was involved with Dyer in the unlicensed practice of medicine. While it is true that petitioner has denied in his complaint any "wrongdoing" (Petition for Certiorari, p. 9), he did admit during his deposition that it was Dr. Dyer's practice to give him a pad of pre-signed, but otherwise blank prescription forms which he used for prescribing drugs for patients he treated. (Deposition of Larry Abrams, pp. 43-44).

Section 73-25-33, Mississippi Code of 1972, provides:

"The practice of medicine shall mean to suggest, recommend, prescribe, or direct for the use of any person,

> any drug, medicine, appliance . . . for the cure, relief, or palliation of any ailment or disease of the mind or body . . . after having received, or with the intent of receiving therefor, either directly or indirectly, any bonus, gift, profit or compensation . . . ."

Section 97-23-43, Mississippi Code of 1972, makes it a criminal offense for any person to "practice . . . as a physician or surgeon . . . without having first been examined and obtained a license as required by law."

Accordingly, there is no dispute regarding any statement or suggestion in the Board's order that petitioner was engaged in the unlicensed and, therefore, unlawful practice of medicine. See: *Codd v. Velger, supra.*

## CONCLUSION

State defendants submit that petitioner, by his own admission, was engaged in the unlicensed practice of medicine as stated in the order of the Board of Health, and that no further purpose would be served by providing a hearing. Accordingly, state defendants urge that the Petition for Certiorari be denied.

Respectfully submitted,

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